

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY COUNCIL OF THE CITY OF ST. PAUL

In the Matter of the Mobile Food
Vehicle License held by Jose F. Ponce,
d/b/a Mi Pueblito, for the Premises
Located at 672 Arcade Street in Saint
Paul

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on May 12, 2006, in Room 41 of the Saint Paul City Hall. The hearing continued on May 24, 2006. The record closed on July 3, 2006, upon receipt of the City's post-hearing brief. No post-hearing brief was submitted on behalf of the Licensee.

Rachel Gunderson, Assistant City Attorney, Office of the City Attorney, 400 City Hall, 15 West Kellogg Blvd., Saint Paul, Minnesota 55102, represented the City of Saint Paul's Office of License, Inspections and Environmental Protection (LIEP). Gary K. Wood, Attorney at Law, 10 South 5th Street, Suite 950, Minneapolis, Minnesota 55402, appeared on behalf of the Licensee, Jose F. Ponce, d/b/a Mi Pueblito.

NOTICE

This Report contains a recommendation and not a final decision. The Saint Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Under Section 310.05 of the Saint Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensee has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. The Licensee and any interested parties should contact the Saint Paul City Council, 310 City Hall, Saint Paul, Minnesota 55102, to ascertain the procedure for presenting argument to the Council.

STATEMENT OF ISSUES

Should the Saint Paul City Council take adverse action against the mobile food vehicle license held by the Licensee on the grounds that the Licensee continued to operate his mobile food vehicle at a fixed location after the expiration of his Conditional Use Permit and in violation of conditions placed on his license?

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee, Jose F. Ponce, d/b/a Mi Pueblito, holds a license from the City of Saint Paul to operate a mobile food vehicle. The Licensee's wife, Martha Ponce, participates in that business. The current license took effect on September 9, 2002, and expires on September 9, 2006.^[1]

2. The Licensee's mobile food vehicle was inspected and met the health requirements for licensure.^[2]

3. A mobile food vehicle license allows the licensee to operate at any place on a public street. Typically such vehicles move from location to location rather than having a permanent location.^[3]

4. In 2003, the Licensee asked that he be allowed to operate his mobile food vehicle from a fixed location on a vacant lot located at 672 Arcade Street, St. Paul. The property is owned by the Licensee, his wife, and a few other individuals. A building previously located on that site had burned down, and the Licensee told the City that he and his wife could not rebuild right away. They wanted to temporarily operate Mi Pueblito from that location until they could build a restaurant there.^[4]

5. The property at 672 Arcade Street is zoned B3.^[5] In a B3 zoning district, City ordinances require that "[a]ll business, storage, servicing or processing shall be conducted within completely enclosed buildings, except for off-street parking, off-street loading, and outdoor uses specifically allowed as permitted or conditional uses."^[6] The City Code includes a table that lists various types of principal uses of property and indicates whether those uses are "permitted" or "conditional" uses in a B3 business district. The Code states that a Conditional Use Permit is needed in a B3 zoning district for "outdoor uses, commercial."^[7]

6. Jeff Hawkins, an inspector with the City's Office of License, Inspections and Environmental Protection (LIEP), was assigned to help the Licensee and his wife with their Conditional Use Permit application. He informed them that they would need to apply for a Conditional Use Permit for "other outdoor uses" for Mi Pueblito to operate at 672 Arcade Street. Thereafter, with Mr. Hawkins' assistance, Mi Pueblito applied to the Saint Paul Planning Commission for a Conditional Use Permit to operate the mobile food vehicle at 672 Arcade Street.^[8]

7. On June 19, 2003, a public hearing regarding the application was held before the Zoning Committee of the Planning Commission. A staff report was prepared and presented to the Committee at that time. In the report, zoning

staff recommended approval of the Conditional Use Permit for outdoor sales from a food concession trailer at 672 Arcade Street, subject to the condition that the Conditional Use Permit would be valid for two years only, and would expire on December 31, 2005.^[9]

8. At the public hearing, the Zoning Committee of the Planning Commission approved the Conditional Use Permit with the recommended two-year condition and additional conditions to limit the hours of operation, require the use of electrical power, and prohibit the use of a generator.^[10]

9. On June 27, 2003, the full Planning Commission approved the issuance of a Conditional Use Permit for outdoor sales at 672 Arcade Street from a food concession, with the four specified conditions, including the condition that the permit would be for two years only and would expire on December 31, 2005.^[11] The Conditional Use Permit issued to the Licensee stated:

The decision to grant this permit by the Planning Commission is an administrative action subject to appeal to the City Council. Anyone affected by this action may appeal this decision by filing the appropriate application and fee at the Zoning Office **Any such appeal must be filed within 15 calendar days of the mailing date noted below.**^[12]

There is no evidence that the Licensee ever appealed the decision of the Planning Commission to the City Council.

10. The conditions set forth in the Conditional Use Permit were also made conditions of the Licensee's mobile food vehicle license, in accordance with the City's usual practice.^[13]

11. To comply with the conditions specified by the City, the Licensee had \$4,000 in electrical work done to enable the vehicle to be plugged directly into an electrical pole rather than use a generator. Further modifications would be necessary before the vehicle could be hooked up to a generator again.^[14]

12. By letter dated December 7, 2005, Yaya Diatta, City Zoning Inspector, notified Mr. Ponce that the Conditional Use Permit "will expire on *December 31, 2005, at which time, the use must be discontinued, and all equipment associated with this use (e.g., trailer, tables, chairs, signage, etc) must be completely removed from this location.* If you intend to extend this use beyond that date, you may reapply for a new Conditional Use Permit from the Planning Commission before December 31, 2005."^[15] The letter informed Mr. Ponce in very small font^[16] at the bottom of the page, after the signature block, that he could appeal the order within ten days of the date it was mailed and obtain a hearing before the Board of Zoning Appeals.^[17] The Licensee did not file an appeal.^[18]

13. Prior to the end of 2005, the Licensee submitted an application to the City for a new Conditional Use Permit.^[19] The application was reviewed by Mr. Hawkins. City staff told the Licensee that their recommendation to the Planning Commission would be to deny the application, in part because they learned of a state statute imposing a 21-day restriction on the operation of a mobile food unit at any one place unless it is operated in conjunction with a permanent licensed business.^[20] Environmental Health personnel brought that statute to the attention of LIEP staff; they had not been aware of the statute previously. City staff informed the Licensee that he would need to withdraw the application if he wanted a full refund.^[21]

14. By e-mail to the City dated January 2, 2006, Jose and Martha Ponce requested that their application for a Conditional Use Permit at 672 Arcade Street be withdrawn and the fee be returned.^[22]

15. By letter dated February 17, 2006, Mr. Diatta informed the Licensee that the Conditional Use Permit had expired and ordered that the Licensee remove the mobile food trailer and all equipment association with the operation by February 24, 2006.^[23]

16. On February 25, 2006, Mr. Diatta discovered that Mi Pueblito was still operating at 672 Arcade Street. He spoke to the Licensee and told him that he was not supposed to be operating.^[24]

17. By letter dated March 1, 2006, the City's LIEP Office informed the Licensee that it had recommended revocation of his Mobile Food Vehicle license based upon his continued operations after expiration of the Conditional Use Permit.^[25]

18. By letter dated March 8, 2006, counsel for the Licensee requested a hearing before an Administrative Law Judge.^[26]

19. The City thereafter issued the Notice of Hearing setting this matter on for hearing before the Administrative Law Judge. The Notice was served on the Licensee by mail, and filed with the Office of Administrative Hearings.^[27]

20. Mi Pueblito was still operating at 672 Arcade approximately one week prior to the May 12, 2006, hearing.^[28]

21. The Licensee conducts business from a mobile food vehicle and thus does not conduct business within a completely enclosed building.^[29] Customers of Mi Pueblito do not enter the vehicle to purchase the food. Instead, customers walk up to the window of the vehicle, and food purchases and payments are passed through the window. The customers either take the food away or eat at nearby outdoor picnic tables.^[30]

22. Although the term “outdoor” is not defined in City ordinances, City staff consider sales from mobile food vehicles to be an outdoor commercial use.^[31]

23. Under the City Code, the only outdoor uses allowed in a B3 zoning district without a Conditional Use Permit are an “outdoor garden center” and an “outdoor restaurant” that is accessory to an indoor restaurant or a farmer’s market.^[32] Other commercial outdoor uses require issuance of a Conditional Use Permit.^[33]

24. There is no evidence that any outdoor retail sales of plants, lawn furniture, playground equipment, or garden supplies occur at 672 Arcade Street. There is no evidence that any indoor restaurant or farmers’ market is located on the same lot as Mi Pueblito. As a result, Mi Pueblito has not been shown to be an outdoor garden center or an outdoor restaurant “accessory to an indoor restaurant or a farmers’ market,” and it requires a Conditional Use Permit to operate in a fixed location in a B3 zoning district.

25. The City permits “food and related goods sales” and “restaurants” in a B3 zoning district without a Conditional Use Permit.^[34] However, the operations of Mi Pueblito do not fall within this category of use because, apart from outdoor uses specifically allowed as permitted or conditional uses and off-street parking and loading, “[a]ll business, storage, servicing or processing” in a B3 district is required to be “conducted within completely enclosed buildings.”^[35]

26. Some mobile food vehicles in Saint Paul are operating illegally on private property. Their operators have been told by City staff that they need to go before the Planning Commission and obtain a Conditional Use Permit.^[36]

27. The operation of Mi Pueblito at 672 Arcade after the Conditional Use Permit had expired on December 31, 2005, and after the Licensee had been told by the City to stop operating, violated the condition placed on the Licensee’s mobile food vehicle license.

28. The special conditions imposed on the license would not apply if the Licensee moved the vehicle to another location. Thus, if the Licensee had moved the mobile food vehicle and operated Mi Pueblito from a public street, that would have been permitted under his mobile food vehicle license.^[37]

29. A high percentage of persons holding mobile food vehicle licenses in Saint Paul are of Hispanic and Hmong heritage.^[38] However, there was no convincing evidence that the Licensee’s national origin played any improper role in the City’s decision to propose revocation of the Licensee’s mobile food vehicle license.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Saint Paul City Council and the Administrative Law Judge have jurisdiction in this matter pursuant to the St. Paul Legislative Code § 310.05 and Minn. Stat. § 14.55 (2004).

2. The hearing was conducted in accordance with the requirements of Minnesota Statutes sections 14.57 to 14.62 and applicable portions of the procedures set forth in section 310.05 of the Saint Paul Legislative Code.

3. The City has given proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements of law and rule.

4. The City bears the burden in this matter of proving by a preponderance of the evidence that adverse action is warranted with respect to the Licensee's mobile food vehicle license.

5. Chapter 310 of the Saint Paul Legislative Code contains general provisions relating to licenses issued by the City. Section 310.06(b)(5) and (6) of the Saint Paul Legislative Code specifies that adverse action may be taken when "[t]he licensee or applicant has failed to comply with any condition set forth in the license, or set forth in the resolution granting or renewing the license;" or "[t]he licensee or applicant . . . has violated . . . any of the provisions of . . . any . . . ordinance . . . reasonably related to the licensed activity"

6. Adverse action is defined in Saint Paul Legislative Code § 310.01 to include the revocation or suspension of licenses and the imposition of fines.

7. Section 2.02 of the Saint Paul Legislative Code specifies that "[w]ords and phrases shall be construed so far as possible in their plain, ordinary and usual sense except that technical words and phrases having a peculiar and recognized meaning in law shall be understood according to their technical import."

8. Under Minn. Stat. § 157.15, subd. 9 (2004), a "mobile food unit" is defined to mean "a food and beverage service establishment that is a vehicle mounted unit, either motorized or trailered, operating no more than 21 days annually at any one place or is operated in conjunction with a permanent business licensed under this chapter or chapter 28A at the site of the permanent business by the same individual or company, and readily movable, without disassembling, for transport to another location." "Mobile food vehicle" is defined in Saint Paul Legislative Code § 331A.04(17) as "[a] food establishment preparing and/or serving foods from a self-contained vehicle, either motorized or within a trailer."

9. A "restaurant" is defined in Section 65.613 of the Saint Paul Legislative Code as "[a] public eating place which serves a substantial portion of

its food for consumption at tables or counters located on the premises. This term shall include, but not be limited to, an establishment known as a caf, smorgasbord, diner or similar business. Any facilities for carry-out shall be clearly subordinate to the principal use of providing foods for consumption on the premises.” Section 65.616 states with respect to “outdoor” restaurants that “[t]he use shall be accessory to an indoor restaurant or a farmers’ market.”

10. “Accessory use or accessory” is defined in Section 65.910 of the Saint Paul Legislative Code to mean “[a] building, structure or use which is clearly incidental to, customarily found in connection with, and . . . located on the same zoning lot as, the principal use to which it is related.”

11. Section 66.421 of the Saint Paul Zoning Code requires a Conditional Use Permit for outdoor commercial uses in a B3 District, with the exception of an outdoor garden center and an outdoor restaurant. Mi Pueblito does not fall within either of these exceptions.

12. Section 66.443 of the Saint Paul Legislative Code, which relates to “required conditions in the B3 general business district,” specifies that “[a]ll business, storage, servicing or processing shall be conducted within completely enclosed buildings, except for off-street parking, off-street loading, and outdoor uses specifically allowed as permitted or conditional uses.” Because Mi Pueblito’s sale of food was done outdoors and not in a completely enclosed building, it does not fall within the category of “food and related goods sales.”

13. Because Mi Pueblito is not an outdoor garden center or an outdoor restaurant, it does not fall within the outdoor uses allowed in a B3 zoning district without a Conditional Use Permit. Moreover, because Mi Pueblito does not conduct business within a completely enclosed building, it does not fall within the definition of a “restaurant” or a business engaged in “food and related goods sales.”

14. It is reasonable and consistent with the plain, ordinary, and usual sense of the term “outdoor” for the City to view the operations of mobile food vehicles as an outdoor commercial use. Mi Pueblito properly falls within the category of “outdoor uses, commercial” for which a Conditional Use Permit is required in a B3 district.

15. The City demonstrated by a preponderance of the evidence that the Licensee failed to comply with a condition of his license and also failed to comply with the Saint Paul Legislative Code’s zoning ordinances relating to the licensed activity. The Licensee has not refuted the City’s showing.

16. The Licensee has not shown that the City engaged in discriminatory enforcement or otherwise has treated the Licensee differently based on his national origin or ethnic background.

17. These Conclusions are reached for the reasons set forth in the accompanying Memorandum, which is hereby incorporated by reference in these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED:

That the Saint Paul City Council take adverse action against the mobile food vehicle license held by Jose F. Ponce, d/b/a Mi Pueblito.

Dated: July 24, 2006.

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The City argues in this proceeding that revocation of the Licensee's mobile food vehicle license is appropriate because the Licensee is not complying with the conditions of his license or with applicable zoning codes. The City contends that, while a restaurant operating in an enclosed building would be able to operate at 672 Arcade without a Conditional Use Permit, and a mobile food vehicle would be permitted to be located next to such a restaurant as an accessory use without a Conditional Use Permit, a mobile food vehicle alone does not qualify as a permitted use in a B3 zoning district in the absence of a Conditional Use Permit.

The Licensee asserts that his mobile food vehicle is operated on land he owns with his wife and others, the business complies with the applicable zoning ordinance, and no Conditional Use Permit is needed. In particular, the Licensee contends that Mi Pueblito does not involve "outdoor" sales and that the zoning code does not encompass this type of business. He points out that the zoning code permits other types of businesses to operate in B3 districts without a conditional use permit—such as restaurants, outdoor restaurants, coffee kiosks, sales of "food and related goods," and Dairy Queens that only serve outside—and asserts that Mi Pueblito is similar in operation to these businesses. In the alternative, if it is found that Mi Pueblito is, in fact, a commercial outdoor use for which a conditional use permit is needed, the Licensee argues that he was denied due process by virtue of the City's failure to provide a conditional use permit for a reasonable time and its refusal to extend the term of the permit. In this regard, the Licensee asserts that the Conditional Use Permit originally had a five-year period, but was limited to two years by the City, with no opportunity to challenge this limitation or have a hearing on the issue, and that the Licensee's request for an additional Conditional Use Permit was denied.

The category of “outdoor uses, commercial” is used by the City under the zoning code as a “catch-all” for outdoor uses that do not otherwise fall within a more specific category of outdoor uses included in the code. The term “outdoor” use is not defined in the City Code, but the Code indicates that words and phrases are to be construed in accordance with their “plain, ordinary and usual sense” to the extent possible. “Outdoor” is defined to mean “of or relating to the outdoors;” “performed outdoors;” or “not enclosed: having no roof.”^[39] It is concluded that the City’s interpretation of food sales from a mobile food vehicle as an “outdoor” commercial use is consistent with the ordinary meaning of the word.

As set forth more fully in the Findings and Conclusions above, the Licensee has not shown that the business operations from his food vehicle should properly fall within some other category of use that is permitted under the Saint Paul Legislative Code without a Conditional Use Permit. Because there is no evidence that any indoor restaurant or farmers’ market is located on the same lot as Mi Pueblito, or that any outdoor retail sales of plants, lawn furniture, playground equipment, or garden supplies occur at that location, Mi Pueblito has not been shown to be an outdoor garden center or an outdoor restaurant “accessory to an indoor restaurant or a farmers’ market.” Moreover, because the business of Mi Pueblito is not conducted within a completely enclosed building, it does not properly fall within the categories of a “restaurant” or “food and related goods sales” that are permitted uses in a B3 zoning district. The City’s witnesses testified that the basis for the requirement that restaurants be enclosed in a building involves safety issues regarding food handling and cleanliness, and that restaurants are required to meet different health code requirements than mobile food vehicles.

Under the circumstances, it is evident that Mi Pueblito requires a Conditional Use Permit to operate in a fixed location in a B3 zoning district. It is undisputed that the Conditional Use Permit previously granted to the Licensee has expired. The Licensee did not file an appeal of the original Planning Commission decision to impose a two-year limitation on the duration of that Conditional Use Permit despite being informed of his ability to do so.^[40] He also did not file an appeal of the City’s December 7, 2005, Enforcement Notice reminding him about the impending expiration of the Conditional Use Permit despite being informed of his ability to do so (albeit in small print).^[41] In addition, the Licensee elected to withdraw his application for a new Conditional Use Permit rather than risk denial of the application by the Planning Commission and/or City Council and loss of his application fee. Although the City LIEP staff told the Licensee that they would recommend denial, the Licensee should have known from his past experience that the Planning Commission and City Council were ultimately the entities who had authority to decide whether or not a Conditional Use Permit would be issued. In addition, the Licensee would be free to reapply for a Conditional Use Permit at any time and pursue that application to a decision by the Planning Commission and/or the City Council. It appears that the Licensee has been accorded due process in this matter, and there is no

convincing evidence that the City has treated him differently based on his national origin or ethnic background. While the City has introduced evidence supporting the imposition of disciplinary action against the mobile food vehicle license, the City may wish to consider action short of revocation in order to permit the Licensee to operate his vehicle in locations other than 672 Arcade Street, consistent with his license.

B.L.N.

^[1] Exs. 1-2, 1-3.

^[2] Testimony of K. Schweinler.

^[3] Testimony of J. Hawkins, K. Schweinler.

^[4] Testimony of J. Hawkins, J. Ponce; Ex. 11-1.

^[5] Ex. 10-1; Testimony of Y. Diatta, J. Hawkins. The B3 general business district “is intended to provide sites for more diversified types of business than those in the B1 and B2 business districts [pertaining to local business districts and community business districts], and is intended for use along major traffic arteries or adjacent to community business districts.” St. Paul Leg. Code § 66.415.

^[6] St. Paul Leg. Code § 66.443.

^[7] St. Paul Leg. Code § 66.421 (table).

^[8] Testimony of J. Hawkins. In 2003, when the Licensee applied for the Conditional Use Permit, the portion of the St. Paul Legislative Code relating to zoning indicated that such a permit was necessary for “other outdoor uses.” As noted above, the Code now uses the terminology “outdoor uses, commercial” instead of “other outdoor uses.” Testimony of J. Hawkins.

^[9] Exs. 2-1, 3-1, 10-3, 11-1; Testimony of J. Hawkins.

^[10] Exs. 2-2, 11-1; Testimony of J. Hawkins.

^[11] Exs. 1-1, 2-1, 2-2, 3-1; Testimony of J. Hawkins, Y. Diatta.

^[12] Ex. 3-1 (emphasis in original).

^[13] Ex. 1-1; Testimony of K. Schweinler.

^[14] Testimony of J. Ponce.

^[15] Ex. 4-1 (emphasis in original).

^[16] The font size appears to be approximately 7-point.

^[17] Ex. 4-1.

^[18] Testimony of Y. Diatta.

^[19] Testimony of J. Ponce.

^[20] See Minn. Stat. § 157.15, subd. 9.

^[21] Testimony of J. Hawkins.

^[22] Ex. 12; Testimony of J. Hawkins.

^[23] Ex. 5-1.

^[24] Testimony of Y. Diatta.

^[25] Ex. 6-1.

^[26] Ex. 7-1.

^[27] Ex. 8.

^[28] Testimony of K. Schweinler.

^[29] Testimony of K. Schweinler, J. Hawkins.

^[30] Testimony of Y. Diatta.

^[31] Testimony of Y. Diatta, J. Hawkins. In 2003, when the Licensee applied for the Conditional Use Permit, the portion of the City Legislative Code relating to zoning indicated that such a permit was necessary for “other outdoor uses.” The City Code now uses the terminology “outdoor uses, commercial” instead of “other outdoor uses.” In addition, in 2003, the Code did not include a

reference to outdoor restaurants. That provision was not adopted until June 2004. Testimony of J. Hawkins.

[32] St. Paul Leg. Code § 66.421, 65.616. In 2003, the Code did not include a reference to outdoor restaurants. That provision was not adopted until June 2004. Testimony of J. Hawkins.

[33] St. Paul Leg. Code § 66.421 (table).

[34] Testimony of Y. Diatta; see St. Paul Leg. Code § 66.421 (table).

[35] St. Paul Leg. Code § 66.443.

[36] Testimony of J. Hawkins.

[37] Testimony of K. Schweinler.

[38] Testimony of J. Hawkins.

[39] Merriam Webster On Line Dictionary, www.m-w.com/dictionary/outdoor.

[40] Ex. 3-1.

[41] Ex. 4-1. The Administrative Law Judge urges the City to consider including the language informing individuals of their appeal rights in larger print in the text of the letter, rather than including that information in small print at the bottom of the letter.